

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

\* \* \* \* \*  
HEALTHY SOLUTIONS, LLC, \*  
et al \*  
Plaintiffs, \*  
vs. \*  
ITV DIRECT, INC. \*  
et al \*  
Defendants. \*  
\* \* \* \* \*

CIVIL ACTION  
No. 04-10421-JLT

BEFORE THE HONORABLE JOSEPH L. TAURO  
UNITED STATES DISTRICT JUDGE  
PRETRIAL CONFERENCE

A P P E A R A N C E S

O'CONNOR, CHRISTENSEN & McLAUGHLIN, LLP  
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By: Becky V. Christensen, Esq.

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Susan W. Gelwick, Esq.

Courtroom No. 20  
John J. Moakley Courthouse  
1 Courthouse Way  
Boston, Massachusetts 02210  
April 5, 2005  
11:00 a.m.

APPEARANCES, CONTINUED

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for Cappseals, Inc.  
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P R O C E E D I N G S

**THE CLERK:** Civil action No. 04-10421, Healthy Solutions versus ITV Direct, et al.

Counsel please come forward and identify themselves for the record.

**MS. CHRISTENSEN:** Good morning, Your Honor. I'm Becky Christensen. I represent the five parties, Healthy Solutions, LLC, Healthy Solutions, Inc., Alejandro Guerrero, Michael Howell and Greg Geremesz.

**MR. KELLY:** Your Honor, my name is Dan Kelly. I'm here with Scott Silverman from Gadsby & Hannah. We represent Cappseals, Inc. which is the plaintiff in intervenor.

**MR. BROOKS:** Good morning, Your Honor. Peter Brooks. With me is Sue Gelwick from Seyfarth Shaw. We represent ITV Direct.

**THE COURT:** Okay. Now, maybe I have this wrong but I thought the case was settled and that the only thing that remained was for everybody to get paid off.

**MR. KELLY:** Judge, let me explain.

What happened at the hearing the last time we were before you --

**THE COURT:** Have I got that wrong?

**MR. KELLY:** You have got that wrong, that's correct.

1 THE COURT: Okay. Go ahead.

2 MR. KELLY: When we were before you -- let me  
3 just explain how the parties are configured.

4 My client Cappseals, Inc. manufactured --

5 THE COURT: I know all that. You have told me  
6 all that. All I want to know is what happened to the  
7 settlement.

8 MR. KELLY: What we had agreed the last time  
9 we were before you is that Healthy Solutions, the middleman,  
10 would be able to settle with the ultimate distributor ITV by  
11 a mutual dismissal of claims. In addition, Healthy  
12 Solutions agreed to give us an agreement for judgment for  
13 the full amount owed.

14 The caveat, however, which was expressly  
15 represented to the Court by all three lawyers is that in  
16 this stipulation of dismissal they would carve out or  
17 reserve Cappseals' rights to go after ITV as a reach and  
18 apply plaintiff.

19 In other words, their motion to dismiss would not  
20 compromise ITV -- our client Cappseals' rights to piggyback  
21 on top of Healthy Solutions to go after ITV for the money  
22 owed by ITV to Healthy Solutions.

23 THE COURT: Her.

24 MR. KELLY: Her client.

25 THE COURT: But she is already going to pay

1     you what is owed.

2                   **MR. KELLY:** No, her client has agreed to a  
3 judgment; but it is a judgment on paper only. Her client is  
4 judgment proof. Their only asset is the claim that they  
5 have against ITV.

6                   When we first came in here a year ago, we sought a  
7 preliminary injunction as a reach and apply plaintiff to  
8 enjoin them from doing exactly what they're trying to do  
9 now. That is, compromise the claim --

10                  **THE COURT:** All right. So what do you want?  
11 Do you want to try your case now?

12                  **MR. KELLY:** We want to undo the motion to  
13 dismiss, enforce the settlement agreement that had been  
14 reached by the parties and try our case against ITV. That's  
15 what we want to do.

16                  **THE COURT:** You don't have a settlement  
17 agreement. You don't have a meeting of the minds.

18                  **MR. KELLY:** We do have a meeting of the  
19 minds -- well, actually, Your Honor, we don't even need the  
20 settlement agreement. We have the agreement for judgment  
21 which we filed with the Court, which the Court has endorsed.

22                  Healthy Solutions, it would certainly be in their  
23 interests to enforce the settlement agreement, which was  
24 agreed to by all three parties. But that's irrelevant to  
25 us.

1 All we want to do now is proceed as a reach and  
2 apply plaintiff and a third-party beneficiary plaintiff  
3 against ITV.

4 THE COURT: What does everybody else want?

5 MR. BROOKS: Your Honor, if I may. You do  
6 have the transcript of that last hearing as part of the  
7 record. It is very clear from the transcript that what the  
8 parties were talking about at that point in time was the  
9 concept, the general framework of a possible settlement.

10 At Page 12 of the transcript you instructed the  
11 parties that it all needs to be set down in a writing in  
12 some understandable way.

13 It was clear at that time there was no definitive  
14 agreement. The parties were talking conceptually about  
15 settling the claim --

16 THE COURT: Was it ever reduced to writing?

17 MR. BROOKS: No.

18 MR. KELLY: It was reduced to a writing,  
19 Judge. It was exchanged between counsel for Healthy  
20 Solutions and Cappseals. We agreed on it. It consisted of  
21 a plain vanilla agreement for judgment and a stipulation of  
22 dismissal. We carved out our rights but they never  
23 responded so they did not agree.

24 THE COURT: So you don't have a settlement.

25 MR. KELLY: We don't --

1                   THE COURT: Everybody has got to agree. You  
2                   can't have two out of three.

3                   MR. KELLY: Yes, Judge. But there has been a  
4                   great deal of cases on this issue that have been an  
5                   agreement is stated before the Court orally.

6                   But, Judge, we don't care about the settlement. We  
7                   want to proceed with our claims against ITV.

8                   THE COURT: You want a trial.

9                   MR. KELLY: That's correct.

10                  THE COURT: Good. We will give you a trial.  
11                  It is easy to do that. No more discovery, no nothing.

12                  MR. KELLY: No, Judge, we have an outstanding  
13                  motion for sanctions related to a discovery issue.

14                  THE COURT: You got the discovery.

15                  MR. KELLY: We did not get the discovery. We  
16                  did not get the report nor did we get any of the documents  
17                  associated --

18                  (Whereupon, the Court and the Clerk conferred.)

19                  MR. KELLY: We got a three-page general  
20                  description of the damages. We have no documents from them,  
21                  nor did we get the --

22                  THE COURT: Who do you want the documents  
23                  from?

24                  MR. KELLY: I'm sorry?

25                  THE COURT: Who?

1                   MR. KELLY: From ITV.

2                   THE COURT: Why don't you give it to them?

3                   MR. BROOKS: Because it's subject to the  
4 confidentiality order of Judge O'Toole. We have stated --

5                   THE COURT: Oh, that is the one. We haven't  
6 heard from Judge O'Toole.

7                   MR. SILVERMAN: Your Honor, if I may interject  
8 with regard to this point?

9                   One of the things that we tried to make clear  
10 throughout this proceeding is that there is a litany of  
11 documents that we have become aware of that are not in any  
12 way covered by Judge O'Toole's order.

13                   Judge O'Toole's order ordered that an accounting  
14 report be prepared. And it described how the  
15 confidentiality of that report may cover some of the process  
16 involved in preparing that report.

17                   There are documents relating to their defenses and  
18 their affirmative actions against Healthy Solutions  
19 regarding reliance, regarding the fraud that they claim  
20 seems to offset the claims that we have for the products  
21 that were delivered.

22                   THE COURT: I will tell you what, I am going  
23 to order that the documents be produced within thirty days.  
24 That will give you plenty of time to go to Judge O'Toole and  
25 ask him to -- I will say as part of the order that it will



1 be subject to, of course, Judge O'Toole deciding that such  
2 an order should not issue. And if that is the case, I will  
3 withdraw it.

4 MR. SILVERMAN: Well, Your Honor, all that  
5 does --

6 THE COURT: I want to get this case moving.

7 MR. SILVERMAN: That order puts us in the  
8 exact same position that we were in the last time we were  
9 here. ITV was ordered to produce those documents by  
10 February 15th. That day came and went. We got no  
11 additional documents.

12 THE COURT: But if they do it again, I am  
13 going to default them. With prejudice.

14 MR. BROOKS: Absolutely, Your Honor.

15 First of all, there was no such order that we  
16 produce any documents. Your order is very clear, that we  
17 were supposed to give them the report that was done for the  
18 FTC that is subject to Judge O'Toole's order. They have  
19 moved for permission from Judge O'Toole.

20 THE COURT: Do you have that? Have you given  
21 them that report yet?

22 MR. BROOKS: I can't because it is subject to  
23 Judge O'Toole's --

24 THE COURT: That is the one.

25 MR. BROOKS: Right. I have it right here

1 (indicating).

2 THE COURT: I think that if you get the  
3 report, then you look through that and see if you need  
4 anything else.

5 MR. KELLY: Judge, I cannot -- we had this  
6 fight a month and a half ago.

7 The report, as you can see, is only about, what,  
8 fifteen pages. We need the underlying financial data and  
9 all the other documents which support their affirmative  
10 defenses.

11 They have given us five hundred pages of simply  
12 invoices. Or you should strike their affirmative defenses.

13 They should not be able to sort of hide behind this  
14 confidentiality order and say we can't give you anything  
15 because of this confidentiality. There is no reason that  
16 Judge O'Toole's order on the confidentiality of that report  
17 has anything to do with all of their records associated with  
18 these affirmative defenses.

19 You required them to produce them. We want them  
20 and we want to try the case.

21 MR. BROOKS: We have produced all the records  
22 that relate to our affirmative defenses. The only thing we  
23 have not produced is a damage study that was performed by  
24 certified public accountants by order of the FTC, which is  
25 subject to Judge O'Toole's order. Everything else they

1 have.

2 What they're fighting about is all of these other  
3 documents relating to other business activities unrelated to  
4 Supreme Greens, unrelated to Healthy Solutions or Cappseals.  
5 We have other products.

6 The FTC has received all of those documents of our  
7 other business activities. They want all of that. They  
8 want everything that the FTC has had access to, which is  
9 every business record that we have. It's got nothing to do  
10 with this product, nothing to do with these parties.

11 We had produced everything that relates to our  
12 claims and our counterclaims. The only thing that is  
13 missing is the detail of the damage analysis of this report  
14 (indicating) which we have said over and over again we will  
15 produce to them the moment, the day that Judge O'Toole says  
16 it's released from my confidentiality.

17 **THE COURT:** He is making this representation.  
18 He puts his ticket on the line when he does that.

19 **MR. SILVERMAN:** Your Honor, and I think that's  
20 a mistake because we already have provided to this court a  
21 document that shows that that is just not the case.

22 The FTC in communications that I have had with them  
23 have specifically represented that the vast majority of the  
24 documents which they say goes over about fifty thousand  
25 relates to Supreme Greens. And, in fact, they have filed

1 affidavits with this Court before Judge O'Toole attaching  
2 documents relating to Supreme Greens and the marketing of  
3 the Supreme Greens that ITV has not produced to us.

4 It's quite clear, Your Honor, I have attached a  
5 document that was --

6 **THE COURT:** What is the case that Judge  
7 O'Toole has?

8 **MR. SILVERMAN:** I'm sorry, Your Honor, I  
9 didn't hear what you said.

10 **THE COURT:** You are talking about the FTC. Is  
11 this litigation before Judge O'Toole?

12 **MR. SILVERMAN:** This present litigation? No,  
13 Your Honor. What's before Judge O'Toole is claims regarding  
14 the marketing of Supreme Greens by ITV and Healthy  
15 Solutions. We are not a party to that case.

16 But as I mentioned, Your Honor, attached to a reply  
17 brief that was submitted by the FTC, that was also an  
18 exhibit to the affidavit that I submitted to this court, is  
19 an email describing how ITV should be -- it's an email sent  
20 out by Donald Barrett, that is, the principal of ITV to his  
21 underlings saying we should now be using the original  
22 version of the Supreme Greens infomercial.

23 The reason why that is critical, Your Honor, is  
24 because that was sent out in February, late February of  
25 2004, well after we shipped the product to ITV and well

1 after they were supposed to pay for that product.

2 But they're now claiming that in reliance on  
3 representations by Healthy Solutions they invested all sorts  
4 of money in this product. And they had allegations against  
5 them by the FTC and they are going to be losing millions of  
6 dollars. That they were still accepting shipments from us,  
7 selling the product, making money on the product and  
8 deciding not to --

9 MR. KELLY: Clear of the specific elements  
10 which they say that they relied. In other words, they claim  
11 Guerrero who was the head of Healthy Solutions was not a  
12 doctor, that he was lying about the product.

13 Well, the FTC told them he was lying about the  
14 product. They knew about it. And yet they continued to  
15 market it in the same fashion that they did before.

16 All of those documents associated with their  
17 knowledge and the issue of reliance and whether it was  
18 reasonable or not they have withheld from us. They have  
19 produced them in the FTC action but have withheld them from  
20 us.

21 They should not be able to hide behind this  
22 ten-page report. You know, Judge, I'm content -- if  
23 Mr. Brooks says we produced every document that has to do  
24 with our affirmative defenses, I'm content with an order  
25 saying they're precluded from relying on any other document.

1 THE COURT: Of course.

2 MR. KELLY: And that report as far as I'm  
3 concerned is inadmissible because it's simply an  
4 accountant's --

5 THE COURT: Of course. Of course.

6 MR. KELLY: -- hearsay so they can't rely on  
7 the report either.

8 THE COURT: Absolutely I'd issue an order.

9 MR. KELLY: So we're prepared to go forward.

10 THE COURT: All right. Good. Let's go  
11 forward.

12 MR. BROOKS: Absolutely acceptable.

13 THE COURT: You just prepare a form of order  
14 and I will sign it.

15 When do you want to try the case?

16 MR. BROOKS: Your Honor, there is one other  
17 thing I'm confused on.

18 THE COURT: No. First when do you want to try  
19 the case? You guys have got a history and I can possibly  
20 make you history. When do you want to try the case?

21 MR. KELLY: We're prepared to try this case  
22 within the next three to four weeks, Judge, if you have room  
23 on your calendar.

24 THE COURT: How long will it take?

25 MR. KELLY: Our affirmative case in chief will

1 take no more than two hours.

2 THE COURT: The whole case?

3 MR. KELLY: If they're barred from asserting  
4 these affirmative defenses, which I believe they now are,  
5 then the case will take a day.

6 THE COURT: I didn't say that I am going to  
7 bar them from asserting anything. I am going to bar them  
8 from offering anything that doesn't have a Bates stamp on it  
9 or however else you want to identify it.

10 MR. KELLY: Well, Judge, I anticipate that  
11 their witness is going to get up there and say we incurred  
12 all these damages. We incurred three million for this,  
13 three million for that, but they haven't produced any  
14 documents supporting that so they should be barred from  
15 testifying about --

16 THE COURT: I can't do that.

17 MR. KELLY: Well, then we need the documents,  
18 Judge.

19 THE COURT: You know I can't do that. What  
20 good is their testimony without any documents? You would  
21 murder them on cross-examination.

22 Give them a trial date. How long to try this case?  
23 All of it?

24 MR. KELLY: One day.

25 THE COURT: Is it jury or jury-waived?

1 MR. KELLY: Jury-waived.

2 MS. CHRISTENSEN: I'm sorry, Your Honor. I'm  
3 not quite tracking that.

4 MR. BROOKS: We don't know what case we are  
5 trying. I'm sorry to interrupt you.

6 MS. CHRISTENSEN: That's fine.

7 THE COURT: Whatever is pending. I want to  
8 try it all.

9 MR. BROOKS: We have settled. The plaintiff  
10 and the defendant have settled the case by agreement to  
11 dismiss the claims. So we don't know -- what Cappseals is  
12 trying to do is to force us to try a case that we don't want  
13 to try.

14 We've settled the underlying debt by saying we  
15 don't owe -- neither party owes anybody any money. We've  
16 agreed to that. We've signed it. We have asked you to  
17 dismiss the case between us.

18 So Cappseals seems to want to now come in and try  
19 Healthy Solutions' case against us, a claim that we agreed  
20 to dismiss. So I don't know how long it's going to take to  
21 try. If you're going to force us to try --

22 THE COURT: Because you want to get paid.

23 MR. KELLY: Exactly. We never consented to  
24 that settlement. We have an injunction barring them from  
25 settling.



1                   **THE COURT:** It is a sham they say, your  
2 settlement. They are not going to get paid.

3                   **MR. BROOKS:** It's certainly not a sham. We  
4 have a two million dollar claim against them or more. They  
5 have a two million dollar claim against us.

6                   **THE COURT:** And you say forget it. That  
7 leaves them out in the cold --

8                   **MR. BROOKS:** No, it doesn't. They still have  
9 direct claims against us. If you look at their pretrial,  
10 they are suing us as an intended beneficiary --

11                   **THE COURT:** That is the case you want to try.

12                   **MR. KELLY:** No, we want to try the reach and  
13 apply case and the third-party beneficiary case.

14                   **THE COURT:** All right. We will try both  
15 cases. Give them a date. No more conversation.

16                   **THE CLERK:** One day? Two days?

17                   **MR. BROOKS:** Your Honor, if we're trying the  
18 underlying fraud claim --

19                   **THE COURT:** You are trying his direct claim.  
20 In other words, as I understand it, he is a third-party  
21 claimant.

22                   **MR. KELLY:** Yes. On a reach and apply theory  
23 and also on a third-party beneficiary.

24                   **THE COURT:** We will see how it goes.

25                   **MR. BROOKS:** He has to prove the underlying

1 debt between us.

2 THE COURT: Whatever he has to do.

3 MR. BROOKS: That is a five- to seven-day  
4 trial.

5 THE COURT: Whatever. I am here.

6 MR. BROOKS: Okay.

7 THE COURT: My whole day is just dedicated to  
8 people like you. Whatever it takes it takes.

9 (Laughter.)

10 MR. BROOKS: My apologies.

11 MS. CHRISTENSEN: Your Honor, I'm sorry. We  
12 have tried to dismiss. And we're looking at five to seven,  
13 I think maybe even ten days on the counterfeiting, on the  
14 trademark infringement --

15 THE COURT: Whatever it is.

16 MS. CHRISTENSEN: That is all in?

17 THE COURT: It is all going to be in. That is  
18 the only way I can get it out is to try it. My chief Judge  
19 Young has a great philosophy. Sometimes he doesn't even  
20 talk to you people. He just gives you a trial date and,  
21 bingo, everything goes away for him. I am going to do the  
22 same thing here.

23 THE CLERK: Is this jury, a jury trial?

24 THE COURT: Jury-waived.

25 MR. BROOKS: I think there's a jury demand.

1 MS. CHRISTENSEN: There are jury demands.

2 THE COURT: Not in his case though.

3 MR. BROOKS: The problem is his case is  
4 twofold. He has to prove the debt from Cappseals to Healthy  
5 Solutions --

6 MR. KELLY: Which we've already proved.

7 MR. BROOKS: And then he has to prove the debt  
8 of ITV to Healthy Solutions.

9 THE COURT: He doesn't have to do it to a  
10 jury.

11 MR. BROOKS: Well, we have --

12 THE COURT: He is coming in in a different  
13 posture than your case was. He didn't file a jury claim;  
14 did you?

15 MR. KELLY: I did not.

16 MR. BROOKS: I think the underlying claim  
17 between us has to be tried. There is no settlement that, we  
18 are not going to give up our multimillion dollar claim  
19 against Healthy Solutions --

20 THE COURT: That is up to you.

21 MR. BROOKS: Well, that's the jury claim.

22 THE COURT: Well, except we are not going to  
23 try that --

24 MR. KELLY: If we try the reach and apply  
25 claim, that's an equitable action. We can do that first and

1 we don't need a jury for that.

2 THE COURT: Give them a date.

3 THE CLERK: When do you want to try it?

4 MR. BROOKS: June is fine for me. I have  
5 problems in May.

6 MR. KELLY: I would prefer in three weeks.

7 MR. BROOKS: I think I just said I had some  
8 problems in May so June would be great for me.

9 THE COURT: We will try to make it as  
10 comfortable for everyone.

11 In the meantime, before you leave the building, it  
12 would probably be useful if you had a little chat, all of  
13 you, and see if you can't resolve this case.

14 THE CLERK: Are we still talking about one day  
15 now?

16 MR. KELLY: I believe we're talking about a  
17 week.

18 THE CLERK: Nonjury?

19 MR. KELLY: Nonjury.

20 THE COURT: We have to know that because we  
21 only impanel on Monday.

22 MR. KELLY: I understand.

23 THE CLERK: May 31st.

24 THE COURT: Okay.

25 MR. KELLY: So the only other housekeeping,

1 Judge, is without our having an opportunity to file the  
2 opposition, you mistakenly entered an order dismissing their  
3 claims. So we need -- we filled a motion for  
4 reconsideration because we had not been permitted to file an  
5 opposition.

6 THE COURT: I will withdraw it. We will issue  
7 an order withdrawing the dismissal.

8 MR. KELLY: Thank you.

9 THE COURT: Okay. If I were you, I would chat  
10 though.

11

12 (WHEREUPON, the proceedings were recessed at 11:20  
13 a.m.)

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## C E R T I F I C A T E

I, Carol Lynn Scott, Official Court Reporter for the United States District Court for the District of Massachusetts, do hereby certify that the foregoing pages are a true and accurate transcription of my shorthand notes taken in the aforementioned matter to the best of my skill and ability.

A handwritten signature in cursive script, appearing to read "Carol Lynn Scott", is written over a horizontal line.

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